STATE OF MICHIGAN

COURT OF APPEALS

PEGGY LEWIS,

Plaintiff-Appellant,

v

FARMER JACK, INC.,

Defendant-Appellee.

UNPUBLISHED
March 16, 2006

No. 257285
Oakland Circuit Court
LC No. 2003-052589-NO

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her premises liability case. We affirm.

Plaintiff was injured when she attempted to reach for some canned fruit located on a shelf in defendant's grocery store. While reaching for the canned fruit, she tripped over a small box situated behind several larger boxes. Apparently, there were boxes of product stacked on pallets about three feet high in the middle of the aisle. Plaintiff noticed the larger boxes stacked on top of each other; however, when she walked around the stacks her foot got caught on a smaller box in front of one of the pallets, and she tripped and fell. Plaintiff admittedly did not look down as she walked around the larger boxes on top of the pallet because her attention was directed toward the shelf and not the floor.

On appeal, plaintiff argues that defendant was not entitled to summary disposition because the condition that caused her injuries was not open and obvious. Plaintiff also argues that the open and obvious doctrine is inapplicable because at the time of injury she was shopping in a self-service store and reaching for store product. After review de novo, considering the evidence in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we disagree. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

A landowner owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "However, this duty does not generally encompass removal of open and obvious dangers." *Id*. A danger is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198

Mich App 470, 475; 499 NW2d 379 (1993). But, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. Special aspects of a condition include unavoidable dangers or dangers that impose a uniquely high likelihood of harm or severity of harm. *Id*. at 517-519.

Here, the trial court properly concluded that the condition that caused plaintiff's injuries was open and obvious. When viewing the evidence in the light most favorable to plaintiff, it is clear that plaintiff noticed the stack of boxes on the pallet in the aisle of defendant's store. Although the box that caused plaintiff's injury was smaller than the boxes immediately observable upon inspection, the condition of boxes in the aisle was open and obvious. Plaintiff admitted that she did not look down as she reached for the canned fruit because her attention was directed toward the shelves. An average user with ordinary intelligence would have been able to discover, and avoid, the danger presented; therefore, the condition was open and obvious. Plaintiff has not argued that the "special aspect" exception applies and it does not appear to apply on the facts presented.

Further, the trial court properly rejected plaintiff's argument that the open and obvious doctrine did not apply because at the time of injury she was shopping in a self-service store and reaching for store product. Plaintiff relied on *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 152; 640 NW2d 892 (2002), to support her argument but the *Clark* Court did not find that the open and obvious doctrine was inapplicable under these circumstances. The Court, citing *Jaworski v Great Scott Supermarkets, Inc*, 403 Mich 689, 699; 272 NW2d 518 (1978), merely noted that "an individual shopping in a self-service store is entitled to presume that passageways provided for his use are reasonably safe, and is not under an obligation to see every defect or danger in his pathway." *Id*. Unlike the loose grapes at issue in the *Clark* case, here, the boxes in the aisle definitely stood out and were open and obvious.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot